

**STATE OF MICHIGAN
IN THE SUPREME COURT**

THE PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

v

Supreme Court
No. 151048

ANTONIO TONY GLOSTER,
Defendant-Appellant.

Third Circuit Court No. 12-010845-03-FC
Court of Appeals No. 316553

**PLAINTIFF-APPELLEE'S
SUPPLEMENTAL BRIEF
ORAL ARGUMENT REQUESTED**

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

JASON W. WILLIAMS
Chief of Research,
Training, and Appeals

TONI ODETTE
Assistant Prosecuting Attorney
11th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-2698

Table of Contents

| | <u>Page</u> |
|--|-------------|
| Table of Authorities | ii |
| Statement of Jurisdiction | 1 |
| Statement of Issue Presented | 2 |
| Statement of Facts | 3 |
| Argument | 10 |
| I. A defendant can be scored OV points if he is an accomplice not only to the underlying offense, but also to the specific scored conduct. Defendant here was an accomplice not only to the underlying armed robbery, but also to the predatory selection of the vulnerable victim. He was properly scored 15 points for OV 10. | 10 |
| Standard of Review | 10 |
| Discussion | 10 |
| A. The trial court judge did not clearly err in finding that defendant and his accomplices engaged in predatory conduct. | 11 |
| B. A defendant can be scored OV points when he aids and abets in the conduct being scored. | 15 |
| Relief | 21 |

Table of Authorities

CASES

| | |
|---|--------|
| People v Carines, 460 Mich 750 (1999) | 17 |
| People v Hardy, 494 Mich 430 (2013) | 10 |
| People v Hunt, 290 Mich App 317 (2010) | Passim |
| People v Huston, 489 Mich 451 (2011) | 11-14 |

STATUTES

| | |
|-------------------|----|
| MCL 750.529 | 7 |
| MCL 767.39 | 17 |
| MCL 777.37 | 16 |
| MCL 777.40 | 11 |

Statement of Jurisdiction

This Court has jurisdiction over this application pursuant to MCR 7.303(B)(1) and MCR 7.305(H)(1).

Statement of Issue Presented

I.

A defendant can be scored OV points if he is an accomplice not only to the underlying offense, but also to the specific scored conduct. Defendant here was an accomplice not only to the underlying armed robbery, but also to the predatory selection of the vulnerable victim. Was he properly scored 15 points for OV 10?

The People answer: "Yes."

The trial court answered, "Yes."

The Court of Appeals answered, "Yes."

Defendant answers: "No."

Statement of Facts

Ms. Regina Szczepanik—a Polish-speaking woman—was walking out of the Polish Market in Hamtramck alone in the middle of the day on October 20, 2012, when she was attacked by a man trying to rip her necklace from her neck.¹ The attacker, Marvin Graham²—who had been standing for some time by a bus stop with an accomplice, Calvin Gloster,³ waiting for the right victim to come along⁴—hit her on the back of the head, knocking her to the ground and tearing her blouse. As the two struggled, Szczepanik held onto her necklace and began yelling for the police.⁵

As Graham was about to strike her again, a bystander, Lionel Young, who was sitting in his car at the red light, saw what was going on and yelled out, “hey, what

¹References to the trial record are cited by the date of the hearing followed by the page number; 4/2, 96. Ms Szczepanik testified at trial via a Polish interpreter.

²While Szczepanik could not identify her attacker, defendant’s statement to the police indicated the man was Marvin Graham, his brother’s friend. The Officer in Charge, who interrogated a number of people involved in this case, also testified that the two men on the corner were Marvin Graham and Calvin Gloster. 4/3, 154. Graham pled guilty to unarmed robbery as one of five codefendants in this case. Calvin Gloster was convicted via jury trial of assault with intent to do great bodily harm, armed robbery, and felony firearm

³Because Calvin Gloster and defendant are brothers who share the same last name, Calvin Gloster is hereafter referred to as Calvin.

⁴Video surveillance showed that the attacker was passed by a lone man, two individuals, and then a group of children before he decided to hone in on Szczepanik, who was walking alone. 4/3, 160-161.

⁵4/2, 69-70.

the fuck are you doing.”⁶ Graham then began to run and Young exited his car to pursue him.⁷ Another man, Kevin Parrish, was also in his car at the intersection when he saw the robbery occurring.⁸ When he saw the attacker and his accomplice run towards his car, he got out and grabbed the attacker. At that point, Calvin fired his weapon, striking Parrish in the elbow. Parrish released Graham and both Calvin and Graham fled.⁹

While all of this was going on, defendant was strategically parked in his girlfriend’s blue Jeep Liberty on the same corner where the assault occurred.¹⁰ He had gone to the area near the Polish Market that day with his two brothers (Paris and Calvin Gloster), his cousin (Jamarie Muhammad), and his brother’s friend (Marvin Graham). According to the statement defendant made to police, the group went to Hamtramck “trying to get some money, simple as that.”¹¹ When they “couldn’t get

⁶Id at 87.

⁷Id at 88-90.

⁸Id at 107-108.

⁹Id at 109-111.

¹⁰4/3, 154-158.

¹¹See People’s Attachment A, a transcript of defendant’s interrogation video, admitted at trial as People’s Exhibit 6. See Page 6. Defendant referred to the robbery as a “mission” in his statement. Attachment A, Page 9.

nuttin’,” they saw “this lady and tried to get her purse.”¹² While Graham and Calvin were standing at the bus stop waiting for the appropriate victim to come along, defendant was parked on the corner so that he could see the entire criminal transaction occurring.

After the robbery was interrupted by Young and Parrish and the gun was fired, Graham and Calvin were able to flee.¹³ Defendant, in turn, picked up Calvin and then went around the block to pick up Graham. As defendant was driving around, two local residents, James and Corienna Duff, who lived just down the street from where the robbery occurred, were outside in front of their home when they heard the gunshot. They then noticed defendant’s blue Jeep Liberty going down their street.¹⁴ James Duff noticed two young men run by him and then get into the Jeep.¹⁵ Corienna Duff immediately called the police when she heard the gunshot and was able to read off defendant’s licence plate number to the dispatcher.¹⁶ The car left the scene, but was later traced to defendant’s girlfriend, Christina Clements. Clements testified that

¹²Attachment A, Page 6-7. Defendant also said that Graham does not sell marijuana, as he would “get a chain before he do that.” Pages 20-21.

¹³4/2, 111-115.

¹⁴4/3, 33-35.

¹⁵Id at 34.

¹⁶Id at 54.

she lent the car to defendant earlier that day. When defendant picked her up from work later in the day after the robbery occurred, he was with Calvin and Paris Gloster.¹⁷ Defendant was later arrested.

Police later discovered that this was not the first armed robbery the defendant and his cohorts had committed that same day. Kristin Wilk had been walking home from the bar around 1:30 a.m. on October 20th, 2012, when a car stopped ahead of her and three men with guns got out. The men ripped her necklace from her neck and then took her purse, which contained about \$80. None of the men who got out were the driver. After they robbed her, they got back in the car and the driver drove off.¹⁸ Later that same morning, defendant's girlfriend overheard defendant and his brothers Paris and Calvin talking about a lady with a purse and \$89.¹⁹ Defendant then confirmed in his statement to police that he was also involved in that robbery. He said he was driving Marvin Graham, Calvin Gloster, and Janmarie Muhammad around when they saw the woman walking and decided to rob her. He said he believed all three of them had guns at the time of the robbery.²⁰

¹⁷Id at 64, 66-67.

¹⁸4/3, 21-24.

¹⁹Id at 65.

²⁰Attachment A, Pages 10-12.

Before the People rested, the jury watched defendant's taped interrogation and the video footage from a camera that was panning the area of Belmont and Joseph Campau in front of the Polish Market when the assault on Szczepanik took place. Defendant did not testify.²¹ Following closing arguments, jury instructions, and roughly a half hour of deliberations, the jury convicted defendant of armed robbery.²²

At sentencing, the prosecutor requested 15 points for OV 10 based on predatory conduct and defendant objected.²³ After argument from both sides, Judge Talon held:

It's my recollection that the evidence from the trial supports the scoring of fifteen points for offense variable ten for predatory conduct; that the Defendant and the other persons with whom he was with, that the Defendant drove 'em to Hamtramck to this specific location for the purpose of committing larcenies and that while Mr. Antonio Gloster remained in the car two of the other people that he took there went out to the corner to watch for an appropriate victim and then when the complainant came out that's when one of the Defendants whose been identified I believe, at least in terms of the exam transcript or somewhere along the lines, is that Calvin Gloster told the other person Marvin Graham who actually snatched the chain from the complaining witness. . . . Those are the facts

²¹4/4, 61-64.

²²MCL 750.529. 4/4, 110-138.

²³4/19, 15-21.

I feel is sufficient and I'll score fifteen points for offense variable ten.²⁴

With a PRV score of zero and an OV score of 70, defendant's guidelines were 31-85 months. Judge Talon sentenced defendant to the very top of the guidelines, 85 months to 20 years in prison.²⁵

Defendant appealed and, along with another issue, challenged the scoring of OV 10. The Court of Appeals agreed with Judge Talon that OV 10 was appropriately scored. In so holding, the Court stated:

Here, defendant wrongly claims that the trial court erred when it assessed 15 points for OV 10. Defendant aided and abetted the commission of an offense that involved the exact sort of "predatory conduct" OV 10 is designed to punish. A witness testified that before the robbery, he saw defendant's co-offender standing outside the market where the crime took place. A line of sight existed between where the co-offender stood and where defendant waited in the getaway vehicle. While the co-offender stood at the corner and defendant waited in the car, the co-offender was passed by a lone gentleman, two individuals, and then a group of children. Finally, the victim, a lone female wearing a visible necklace, left the market, and the co-offender attacked her.

From this evidence, the trial court properly found that defendant and his co-offender engaged in predatory conduct as they targeted a particular type of victim—a

²⁴4/19, 21-22.

²⁵4/22, 23-31.

vulnerable woman—and then laid in wait until the perfect victim crossed their path. Defendant’s assertions to the contrary are without merit, and because he has failed to establish a scoring error, he is not entitled to resentencing.

Likewise, the Court footnoted: “Leaving aside the issue of whether a trial court may consider the conduct of a co-offender when scoring OV 10, the record demonstrates that the trial court scored defendant for his conduct—specifically, his role in selecting a vulnerable victim.”²⁶

Defendant then applied for leave to this Court. In its order, this Court directed the parties to address “whether the defendant was properly assigned 15 points for offense variable (OV) 10, MCL 777.40, for predatory conduct, and in particular, whether the scoring of OV 10 was proper based on the defendant’s own conduct, or alternatively, based on the conduct of the defendant’s accomplices. See MCL 767.39; cf. *People v Hunt*, 290 Mich App 317, 325-326 (2010) (conviction not based on aiding and abetting), cited in *People v Hardy*, 494 Mich 430, 442 n 32 (2013).” This supplemental brief follows.

²⁶*People v Antonio Gloster*, unpublished per curium opinion of the Court of Appeals, issued December 30, 2014, n. 2.

Argument

I.

A defendant can be scored OV points if he is an accomplice not only to the underlying offense, but also to the specific scored conduct. Defendant here was an accomplice not only to the underlying armed robbery, but also to the predatory selection of the vulnerable victim. He was properly scored 15 points for OV 10.

Standard of Review

A trial court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence.²⁷ "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo."²⁸

Discussion

The Court of Appeals did not err in upholding the scoring of 15 points for OV 10 because defendant participated in predatory conduct when he actively assisted his accomplices in carrying out their continued plan to snatch necklaces from unsuspecting women walking alone through Hamtramck. Indeed, defendant—who had participated in the robbery of another lone woman earlier in the day and,

²⁷*People v Hardy*, 494 Mich 430, 438 (2013).

²⁸*Id.*

therefore, knew the type of victim the group was after—drove his accomplices to the Polish Market, waited and watched from the corner as his two cohorts carefully selected the appropriate victim (i.e. a woman walking alone wearing a necklace they could grab), and then immediately picked them up after their “mission” (to use defendant’s term) was complete. Because defendant was a knowing and active participant not only in the robbery itself, but *also* in the predatory conduct used, OV 10 was properly scored at 15 points.

A. The trial court judge did not clearly err in finding that defendant and his accomplices engaged in predatory conduct.

OV 10, exploitation of a vulnerable victim, is governed by MCL 777.40, which states in relevant part:

(1) Offense variable 10 is exploitation of a vulnerable victim. Score offense variable 10 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) Predatory conduct was involved..... 15 points

* * *

(3) As used in this section:

(a) “Predatory conduct” means preoffense conduct directed at a victim . . . for the primary purpose of victimization.

(b) “Exploit” means to manipulate a victim for selfish or unethical purposes.

(c) “Vulnerability” means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation...

In *People v Huston*,²⁹ this Court fleshed out the meaning of predatory conduct. There, defendant and his cohort were armed and lying in wait for the victim—a woman walking alone at night in an otherwise empty parking lot—to come along so that they could rob her.³⁰ This Court upheld the scoring of OV 10 at 15 points, reasoning that a defendant’s predatory conduct, by that conduct alone, can create or enhance a victim’s vulnerability.³¹ Further, this Court held that a defendant’s preoffense conduct need not be directed toward a *particular* victim, as a defendant “who seeks opportunistically to rob the first vulnerable person within the community at large who happens along” instills “fear and apprehension” just as the stalking defendant does.³² This Court went on to note that—while predatory conduct does not encompass “purely opportunistic criminal conduct or preoffense conduct involving nothing more than run-of-the-mill planning”—it does include those forms of preoffense conduct that are commonly understood as being predatory in nature.³³

²⁹*People v Huston*, 489 Mich 451 (2011).

³⁰*Id* at 455.

³¹*Id* at 468.

³²*Id* at 459-460.

³³*Id* at 462.

Here, the defendant and his cohorts engaged in predatory conduct to exploit a vulnerable victim when—having just completed another armed robbery against another female wearing a necklace walking alone through Hamtramck—they again went to Hamtramck to seek out another woman walking alone so they could complete what they undoubtedly believed would be another easy robbery. While defendant sat strategically parked so that he could see the entire transaction occurring, Graham and Calvin waited at a bus stop for the appropriate vulnerable victim to walk by: a lone woman with a necklace they could, theoretically, easily grab. Indeed, they watched and waited while a man walked by, then two individuals walking together, and then a group of kids. When they then saw Szczepanik—a lone woman fitting the desired description—come out of the Polish Market, Graham pounced on her while Calvin stood by waiting with the gun and defendant stood by waiting with the getaway vehicle.

Like in *Huston*, the defendants were not looking for a specific victim, but instead for a specific *type* of victim: a woman walking alone who would presumably make an easy target for their mission. As this Court noted in *Huston*, these sorts of robberies aimed at particular types of individuals effectively make a “a victim not only of this victim, but all members of the larger community, each of whom must take precautions against criminal behavior and each of whom may have reasonable

apprehensions concerning the threat of criminal conduct being directed toward them.”³⁴ Indeed, the Court of Appeals recognized this when they noted that the conduct of defendant and his cohorts is the “exact sort of ‘predatory conduct’ OV 10 is designed to punish.”³⁵

Further, the fact that there was nothing inherently vulnerable about the victim they chose does not change the analysis. *Huston* makes clear that vulnerabilities may arise not only out of the victim’s characteristics, but also out of the external circumstances as well.³⁶ “The statute does not mandate that this ‘susceptibility’ be inherent in the victim.”³⁷ Just as the defendants did in *Huston*, the defendants here enhanced the victim’s vulnerability by lying in wait while armed for the right “easy” target to come along. Thus, both the trial court and the Court of Appeals correctly recognized that defendant and his cohorts employed predatory conduct when they targeted the lone women that day for their robberies. OV 10 was properly scored at 15 points because the offense involved predatory conduct.

³⁴*Huston, supra*, at 460.

³⁵*People v Antonio Gloster*, unpublished per curium opinion of the Court of Appeals, issued December 30, 2014.

³⁶*Huston, supra*, at 464-466.

³⁷*Id* at 466.

B. A defendant can be scored OV points when he aids and abets in the conduct being scored.

The issue before the Court in this case goes a step beyond merely whether predatory conduct was involved in the offense, but addresses the question of whether defendant—who was undeniably convicted of the armed robbery under an aiding and abetting theory—can be scored OV points for his role in aiding and abetting not only the underlying offense, but also the predatory conduct involved in the offense as well. In other words, can a defendant be scored OV points if he is an accomplice not just to the underlying offense, but also to the specific conduct scored? The answer should be yes.

In *People v Hunt*,³⁸ our Court of Appeals explored a similar issue, albeit in relation to much different facts than the case at hand. There, the defendant participated in a series of kidnappings where defendant and his codefendants drove the victims to an abandoned house. At some point, the codefendants beat one of the victims for 30-45 minutes while the defendant was in the other room with the other kidnapping victims.³⁹ There was no evidence that defendant participated in the beatings or in any way supported or encouraged the codefendants in the beatings.

³⁸*People v Hunt*, 290 Mich App 317 (2010).

³⁹*Id* at 319-322.

Under those facts, our Court of Appeals held that OV 7—which directs the court to score 50 points when a victim was treated with sadism, torture, or excessive brutality⁴⁰—could not be scored based on the defendant’s actions because the defendant essentially had nothing to do with the brutal beating of a victim.⁴¹

In so holding, our Court of Appeals stated:

[W]hile defendant was present and armed during the commission fo the crimes here, he did not himself commit, take part in, or encourage other to commit acts constituting ‘sadism, torture, or excessive brutality’ under OV 7. Moreover, unlike OV 1, OV 2, and OV 3, OV 7 does not state that ‘[i]n multiple offender cases, if 1 offender is assessed points for [the applicable behavior or result], all offenders shall be assessed the same number of points. See MCL 777.31(2)(b), MCL 777.32(2), MCL 777.33(2)(a). For OV 7, only the defendant’s actual participation should be scored. In this case, the record reflects that defendant’s actions alone did not qualify as ‘sadism, torture, or excessive brutality’ under OV 7.⁴²

The Court went on to repeatedly stress that there were no facts that the defendant ever encouraged or participated in the beatings: “While defendant was present and did have a gun at various times throughout the crime, at no time did defendant take part

⁴⁰MCL 777.37.

⁴¹*Hunt, supra*, at 324-326.

⁴²*Id* at 325-326.

in a beating or fire a weapon.”⁴³ In other words, while defendant aided and abetted the crime of kidnapping, he was merely present for the beatings and should not, therefore, be scored under OV 7 because he did not take part in the beatings.

This line of reasoning used by the Court of Appeals essentially—though not explicitly—applies the well-known concept of aiding and abetting to the scoring of the offense variables, which comports with MCL 767.39. MCL 767.39 states:

Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

Thus, a person who aids and abets a crime can be punished as if he had directly committed the offense.⁴⁴ In the context of sentencing, it follows that a person should be scored for an offense variable if (1) he directly commits the conduct being scored, (2) he aids and abets the conduct being scored, or (3) the specific OV being scored directs the trial court to score all codefendants the same regardless of each

⁴³*Id* at 324.

⁴⁴*See People v Carines*, 460 Mich 750, 757 (1999)(to support a finding that a defendant aided and abetted a crime, the prosecutor must show: (1) that the crime charged was committed by the defendant or some other person, (2) that the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) that the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement.)

defendant's specific conduct. In other words, if a defendant is merely present in regard to the scored conduct like the defendant in *Hunt*, he should not be scored for the conduct of his codefendant. But if a defendant aids and abets the scored conduct like the defendant in the instant case, he should be scored for the conduct.

In this case, the facts are distinguishable from *Hunt* because defendant was not “merely present” for the predatory conduct when he and his accomplices completed two armed robberies—both directed at targeting and victimizing lone women—in Hamtramck that day; he was an active participant. In the early morning hours that day, defendant drove his accomplices to Hamtramck, where the men saw a woman walking alone wearing a necklace. Defendant stopped the vehicle while his three armed cohorts got out, ripped the chain off the woman's neck, and stole her purse. They got back into the vehicle and defendant drove them away. Defendant's girlfriend later overheard the brothers discussing how much money they stole from the woman's purse.

Later on in the day, they went on another “mission”⁴⁵ to Hamtramck. As defendant said in his own statement, he drove them to Hamtramck again because they were “trying to get some money, simple as that.”⁴⁶ When that failed, they “saw this

⁴⁵Attachment A, Page 9.

⁴⁶Attachment A, Page 6.

lady and tried to get her purse” and chain.⁴⁷ To accomplish this, defendant strategically parked on the corner of Belmont and Joseph Campau where he could see two of his accomplices—his brother and his brother’s friend—as they waited for the appropriate victim (i.e., a lone woman wearing a chain they could grab) to come along.

His accomplices waited at a bus stop while less vulnerable victims who did not fit the description passed by: a lone gentleman, two people walking together, and then a group of children. When they saw Regina Szczepanik, who does not speak English, come walking out of the Polish Market alone, one of the accomplices attacked her while the other stood by with a gun and defendant stood by with the getaway vehicle. After the robbery was foiled, defendant—who had a clear visual of the entire transaction—immediately picked up one accomplice and then circled around to pick up the other before the group fled the scene.

Based on these facts, a reasonable inference can be drawn that defendant knew very well what he and his accomplices—who included his brothers, cousin, and brother’s friend—were setting out to accomplish that day: seeking out women walking alone to attack and rob. The MRE 404(b) evidence regarding the robbery that occurred earlier that morning—which, notably, defendant admitted to in his

⁴⁷ Attachment A, Pages 6-7.

statement—illustrates the common scheme or plan the group had to target their crime at women walking alone.

Given the robbery that took place earlier that same day that defendant clearly participated in, defendant knew the *modus operandi* of the crime spree the group was on when he again drove his cohorts to Hamtramck later on in the day for another “mission.” To complete that mission, he borrowed his girlfriend’s car, drove his accomplices to the Polish Market, parked to make sure he could see the crime occurring, waited and watched as his cohorts picked out a victim matching the chosen criteria, and then picked them up after.

Given defendant’s knowledge and active participation in the predatory conduct, this case differs significantly from the defendant in *Hunt*, who was merely present during the relevant actions. While defendant himself did not pick out the *specific* victim, he was clearly aware of, and actively participated in, the day’s goal of stealing necklaces and purses from unsuspecting women walking alone in Hamtramck. Because defendant aided and abetted in not only the armed robbery, but also the predatory conduct at issue, the Court of Appeals did not err in finding that OV 10 was properly scored at 15 points and defendant’s application for leave to appeal should be denied.

Relief

WHEREFORE, the People respectfully request that this Court deny defendant's application for leave to appeal.

Respectfully submitted,

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

JASON W. WILLIAMS
Chief of Research,
Training, and Appeals

/s/ **TONI ODETTE**

TONI ODETTE (P72308)
Assistant Prosecuting Attorney
1441 St. Antoine, 11th Floor
Detroit, MI 48226
(313) 224-2698

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